

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT WELLMAN,

Plaintiff-Appellant,

v

BANK ONE, NA,

Defendant-Appellee,

and

FIRST BANK – LAKEVIEW,

Defendant.

UNPUBLISHED

September 20, 2005

No. 253996

Kent Circuit Court

LC No. 02-011714-CZ

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting defendant Bank One's motion for summary disposition for failure to state a claim on which relief can be granted. MCR 2.116(C)(8).¹ We affirm.

Plaintiff's claims against defendant arise out of plaintiff's participation in an investment scheme with Daniel Broucek, who was doing business as Pupler Distributing Company. Under the scheme, plaintiff would loan money to Pupler in exchange for a promissory note and a post-dated check for the principal as well as a substantial "financing fee." The post-dated checks were drawn on Pupler's account with defendant. Ostensibly, the loan was to enable Pupler to purchase shipments of goods, which would then be resold for a profit. However, in reality, the loans were part of a Ponzi scheme whereby Pupler used the funds raised from some of its

¹ Defendant First Bank-Lakeview was dismissed from this appeal by stipulation of the parties. See *Wellman v First Bank-Lakeview*, unpublished order of the Court of Appeals, entered June 15, 2004 (Do. No. 253996). Therefore, we shall use defendant to refer solely to defendant Bank One.

“investors” to pay the amounts due to other “investors.” After an investigation, defendant froze Pupler’s account and refused to honor two checks issued to plaintiff by Pupler.

After defendant refused to honor the checks, plaintiff commenced this suit alleging, under various theories, that defendant should be held liable for the losses he suffered when the notes and accompanying checks became uncollectible. Defendant responded by filing a motion for summary disposition under MCR 2.116(C)(8). Defendant contended that, as pleaded, plaintiff’s suit was barred by the wrongful conduct rule. The trial court agreed and granted defendant’s motion. The sole issue on appeal is whether the trial court erred when it granted defendant’s motion under MCR 2.116(C)(8) based on the wrongful conduct rule.

This Court reviews de novo the grant or denial of summary disposition based upon a failure to state a claim. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Adair*, *supra* at 119; *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair*, *supra* at 119.

Plaintiff argues the trial court erred when it granted defendant’s motion for summary disposition under MCR 2.116(C)(8). We disagree.

Because the wrongful conduct rule does not rebut plaintiff’s prima facie case, but rather seeks to foreclose plaintiff from proceeding for reasons unrelated to his prima facie case, it is an affirmative defense. *Campbell v St John Hosp*, 434 Mich 608, 615-616; 455 NW2d 695 (1990). Normally, the defendant has the burden of establishing the existence of an affirmative defense. *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App 643, 646; 482 NW2d 474 (1992). However, where a complaint shows on its face that relief is barred by an affirmative defense, the trial court may properly dismiss the complaint for failing to state a claim on which relief can be granted. See *Rauch v Day and Night Mfg Corp*, 576 F2d 697, 702 (CA 6, 1978); see also, e.g., *Glazier v Lee*, 171 Mich App 216; 429 NW2d 857 (1988). In the present case, the promissory notes, which are the basis of plaintiff’s losses, were attached to plaintiff’s amended complaint and became part of the pleadings. MCR 2.113(F)(2). Consequently, the trial court could properly consider whether the wrongful conduct rule barred plaintiff’s claims when ruling on defendant’s motion for summary disposition under MCR 2.116(C)(8).

The wrongful conduct rule generally bars a plaintiff’s claim when the claim is based, in whole or in part, on his own illegal conduct. *Orzel v Scott Drug Company*, 449 Mich 550, 558; 537 NW2d 208 (1995). In *Orzel*, the Court explained:

The rationale that Michigan courts have used to support the wrongful-conduct rule are rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct. If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for

wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties. [*Id.* at 559-560 (citations omitted).]

In order for the wrongful conduct rule to apply, two requirements must be met: 1) the plaintiff's "conduct must be prohibited or almost entirely prohibited under a penal or criminal statute"; and 2) "a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id.* at 561, 564. However, where the plaintiff's illegal conduct "amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe workplace, the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule." *Id.* at 561.

Defendant argues plaintiff's conduct was completely prohibited by the criminal usury statutes, MCL 438.41 and MCL 438.42. Under MCL 438.41,

[a] person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than \$10,000.00, or both.

Under MCL 438.42, a person is "guilty of possession of usurious loan records when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article used to record criminally usurious transactions prohibited by this act." A person found guilty of possession of usurious loan records may be imprisoned for up to 1 year or fined up to \$1,000, or both. *Id.* These statutes are distinguishable from the safety statutes identified by the Court in *Orzel, supra* at 561-562, as insufficient to support application of the wrongful conduct rule. In contrast to those statutes, MCL 438.41 and MCL 438.42 unambiguously criminalize usurious lending and provide significant penalties for such conduct. Therefore, we conclude that the conduct prohibited by these statutes is serious enough to warrant the application of the wrongful conduct rule.²

Plaintiff made at least two loans to Pupler in return for promissory notes and accompanying post-dated checks that included a return of the principal along with large "financing fees." The principal and interest amounts for each loan are listed on the respective promissory notes. Under one note, plaintiff loaned Pupler \$200,000, which was to be paid back

² We decline plaintiff's invitation to limit the application of the rule in the context of the criminal usury statutes to those cases involving "necessitous borrowers." The plain language of the statute bans all lending that charges, takes or receives interest of more than 25% and is not limited in application to "necessitous borrowers."

along with \$10,000 interest in seventeen days. Under a second note, plaintiff loaned Pupler \$150,000, which was to be paid back along with \$7,500 in interest seventeen days later. Hence, under both notes, plaintiff was to receive a 5% return on the principal amounts of the loans over a span of seventeen days. When calculated, the simple interest rate for both loans amounts to over 100% per year. Consequently, plaintiff had to have known that he was charging more than 25% interest per year and, therefore, violated MCL 438.41. Furthermore, plaintiff attached the promissory notes to his first amended complaint, demonstrating that he knowingly possessed the written record of his usurious loans; therefore, plaintiff violated MCL 438.42 as well.

Under the second requirement, there must be a causal nexus between the plaintiff's illegal conduct and the damages sought. Plaintiff's losses occurred when the Pupler "investment" scheme failed and he was no longer able to collect the principal and interest called for in the promissory notes from Pupler. Indeed, plaintiff could not prove his damages without reference to the sums lent to Pupler, as evidenced by the illegal promissory notes and checks. Hence, plaintiff's claims arise from and depend on these usurious notes. Because plaintiff clearly violated the criminal usury statutes and there is a causal nexus between the usurious promissory notes and plaintiff's claims, the wrongful conduct rule applies.

Notwithstanding this, plaintiff contends his claims are excepted from the operation of the wrongful conduct rule. Plaintiff first argues that the usurious notes were not actionable because Pupler voluntarily paid the usurious amounts. In support of this contention, plaintiff cites *Osinski v Yowell*, 135 Mich App 279; 354 NW2d 318 (1984) and *Sienkiewicz v Leonard Mortgage Co*, 59 Mich App 154; 229 NW2d 352 (1975). However, these cases are inapplicable to the present situation. *Osinski* and *Sienkiewicz* dealt with the civil usury statutes, MCL 438.31 and MCL 438.32, as opposed to the criminal usury statutes involved here. In both cases, the Courts noted that, because MCL 438.32 only barred a plaintiff from recovering interest and fees based on a civilly usurious note, a defendant who has voluntarily paid amounts in excess of the principal would have no remedy. *Osinski*, *supra* at 287-288; *Sienkiewicz*, *supra* at 156-157. The Courts did not address whether voluntary payment would preclude the operation of the wrongful conduct rule. In any event, whether the victim of the usurious lender, which in this case is Pupler, has a remedy is irrelevant to determining whether plaintiff's conduct was illegal and, therefore, subject to the wrongful conduct rule.

Plaintiff next argues that the statutory exception to the wrongful conduct rule applies. In *Orzel*, our Supreme Court noted that the wrongful conduct rule will not bar a plaintiff from recovering against a defendant where the statute the plaintiff alleges the defendant violated specifically authorizes the plaintiff's recovery. *Orzel*, *supra* at 570. Likewise, where the statute the defendant allegedly violated does not explicitly authorize plaintiff's recovery, the plaintiff may still recover if the statute impliedly permits recovery. *Id.* at 571. Plaintiff does not identify the statute defendant allegedly violated and does not state whether that statute explicitly or implicitly authorizes plaintiff's recovery. Consequently, plaintiff has failed to establish the presence of a statutory exception to the application of the wrongful conduct rule.

Finally, plaintiff contends that defendant's conduct was more culpable than plaintiff's conduct and, therefore, the culpability exception to the wrongful conduct rule applies. In *Orzel*, *supra* at 569, the Court noted that the wrongful conduct rule will not bar a plaintiff's recovery where the plaintiff and defendant have both engaged in illegal conduct, but where the defendant is more culpable than the plaintiff. Accepting all of plaintiff's allegations as true, defendant's

conduct was at most tortious, whereas plaintiff's conduct was clearly felonious. Under these circumstances we cannot conclude that defendant was more culpable than plaintiff.

The trial court properly determined that, on its face, plaintiff's complaint failed to state a claim on which relief could be granted. Therefore, summary disposition under MCR 2.116(C)(8) was appropriate.

Affirmed.

/s/ Michael R. Smolenski

/s/ William B. Murphy

/s/ Alton T. Davis